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No. 228

In The
Supreme Court of the United States
OCTOBER TERM, 1964

WAVERLY C. BROADWELL and
NANCY BROADWELL, his wife,
and DOHN BROADWELL,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

DON T. EVANS
120 Howard Street
Rocky Mount, N. C. 27802

FRANK P. MEADOWS, JR.
P. O. Box 1413
Rocky Mount, N. C. 27802

Attorneys for Petitioners

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In The
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WAVERLY C. BROADWELL and
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UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Waverly C. Broadwell and Nancy Broadwell, his wife, and Dohn Broadwell, your petitioners, pray that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Fourth Circuit, entered in the above-entitled cases on March 8, 1965.

OPINIONS BELOW

The opinion of the Court of Appeals for the Fourth Circuit, Appendix A, *infra*, is reported at 343 F. 2d 470 (1965). The opinion of the District Court for the Eastern District of North Carolina, (R, pp. App. 25 - 29) is reported at 234 F. Supp. 17 (1964).

JURISDICTION

These actions were consolidated at both the District Court and Court of Appeals levels. On September 21, 1964 the District Court judge who heard the case rendered his decision and judgment against petitioners was entered on September 23, 1964. (R. App. 29) A notice of appeal was filed on October 29, 1964 to the Court of Appeals for the Fourth Circuit which heard the case on March 3, 1965. The Court of Appeals handed down its decision on March 8, 1965 affirming the District Court and entered its judgment on March 8, 1965. This Court, therefore, has jurisdiction under 28 U. S. Code Sec.1254(1).

QUESTIONS PRESENTED

I.

(A.) Whether the tax assessment establishes only a *prima facie* case of liability against the petitioners so as to allow an adjudication of the facts upon which it is based under the specific permission of 28 U. S. Code Sec.2410 (a) to institute a quiet title suit against the respondent?

(B.) Whether suits to remove the cloud of a federal tax lien against the petitioners' title are suits to restrain the collection of the tax barred by the provisions of Sec. 7421 of the Internal Revenue Code of 1954?

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(1)* "R" refers to the appendix as reproduced for the Court of Appeals; besides the copy included in the certified record, petitioners have filed nine copies thereof for this Court.

(C.) Whether the actions to quiet title to petitioners' property are actions for a declaratory judgment with respect to federal taxes which are barred by the provisions of Sec. 2201 of Title 28 of the U. S. Code?

II.

(A.) Whether in an action to quiet title or remove a cloud on title from petitioners' property, the District Court may grant a preliminary injunction against the respondent in order to maintain the *status quo* pending a determination of the principal action?

(B.) Whether the North Carolina *lis pendens* statute, N. C. G. S. Sec. 1-116, affords the petitioners the protection essential to maintenance of *status quo*?

(C.) Whether equitable intervention by way of a preliminary injunction against the respondent is immediately necessary to maintain the *status quo*?

STATUTES INVOLVED

The following statutory provisions are set forth in Appendix B, *infra:* Sections 6321, 6322, 7421 and 7424 of the Internal Revenue Code of 1954 (Title 26, U. S. Code); Sections 1340, 1964, 2201, and 2410 of Title 28, U. S. Code; and Section 1-116 of the North Carolina General Statutes (1963 Supp.).

STATEMENT

These cases originated in the U. S. District Court for the Eastern District of North Carolina by filing verified complaints under 28 U. S. Code, Sec. 2410(a) to remove the cloud of tax liens on title to the property of the petitioners. (R. App. 1, 9, 13, and 21) The liens arose, pursuant to the provisions of Sec. 6321 and 6322 of the Internal Revenue Code of 1954, by reason of a deficiency income tax assessment against the petitioners for the year 1959, which the petitioners contend are arbitrary, capricious, illegal, and erroneous. Thereafter, the petitioners filed motions for preliminary injunction incidental to the suits to quiet title to maintain *status quo*. The petitioners also filed supporting

affidavits to show the ownership of property in addition to that placed in court custody by the complaints. The respondent was threatening a levy and sale of such property to satisfy the liens in issue. Such sales would render the principal actions moot.

The respondent filed motions to dismiss for failure to state a claim upon which relief can be granted for lack of jurisdiction of the subject matter because of Sec. 7421 (a) of the Internal Revenue Code of 1954 and Sec. 2201 of Title 28 of the United States Code and for lack of jurisdiction over the United States because of sovereign immunity. (R, App. 24) Respondent also filed motions in opposition to petitioners motions for preliminary injunction. (R, App. 25) The motions were heard on August 5, 1964.

On September 14, 1964, the District Court filed its consolidated opinion and on September 23, 1964, filed judgments denying motions of the petitioners for preliminary injunction and allowing the respondent's motions to dismiss. (R. App. 25)

The Court of Appeals for the Fourth Circuit affirmed, holding (1) that 28 U. S. Code, Sec.2410 is not available for the purpose for which it is now invoked, and (2) that petitioners have not shown "the existence of special and extraordinary circumstances" warranting resort to a court of equity to contest the taxes in face of the prohibitions of 26 U. S. Code, Sec.7421(a) and 7422.

REASONS FOR GRANTING THE WRIT

1. There is a direct conflict on a main point of this case between the Court of Appeals for the Fifth Circuit in its decision of *U. S. v. Morrison*, 247 F. 2d 293 (1951) and the decisions of the First (*Remus v. U. S.*, 273 F. 2d 293 (1960), Second (*Falik v. U. S.*, 343 F. 2d 38 (1965)), Ninth (*Wells v. Long*, 162 F. 2d 842 (1947).) and now the Fourth Circuit Courts of Appeals.

The Fifth Circuit, in *Morrison, supra*, held that

28 U. S. Code, Sec. 2410 is a grant of jurisdiction to the district court of full equity powers to dispose of an action to quiet title from a federal tax lien. This grant of jurisdiction is complete in and of itself and the district court need not rely on any provision of the Internal Revenue Code to grant to that court jurisdiction to dispose of the type of action here involved. The First, Second and Ninth Circuit Courts of Appeal have stated that Sec. 2410 merely acts as a waiver of sovereign immunity and must look to an independent statute for its jurisdictional requirement. This conflict of decisions between the Courts of Appeal should be resolved.

2. The decision below also conflicts with this Court's decisions in *Clinkenbeard v. U. S.*, 21 Wall. 65, 88 U. S. 65, 22 L.Ed. 477 (1874), and *U. S. v. Rindskopf*, 15 Otto 418, 105, U. S. 418, 26 L.Ed. 1131 (1882), and the Second Circuit Court of Appeals' decision in *U. S. v. O'Connor*, 291 F. 2d 520 (1951). This Court's decisions and the Second Circuit's opinion in *U. S. v. O'Connor, supra*, held that a tax assessment is not conclusive but only a *prima facie* case of liability and, therefore, subject to adjudication when such assessment is illegal and cannot form the basis of an action at law for the collection of the tax. The decision below is based on the erroneous premise that a tax assessment has the conclusive effect of a judgment and, therefore, inquiry may not be made into the merits of the assessment under the provisions of 28 U. S. Code, Sec.2410.

3. The questions presented are of importance in the administration of the federal tax laws.

Settlement of the question by this Court is in the public interest, for it will determine whether persons in the same situation as the petitioners here will be able to bring an action to quiet title against the United States under 28 U. S. Code, Sec. 2410 when a federal tax lien has been levied against their property.

The decision below and the Second Circuit in *Falik v. U. S., supra,* have interpreted 28 U. S. Code, Sec.2410 as allowing jurisdiction only in an action to quiet title brought against the United States by a third party who has an interest in the property subject to a federal tax lien. As of the date of this petition, no Court of Appeals has directly decided the question in favor of a taxpayer bringing such an action to quiet title.

The statute, however, is plain and unambiguous, and thus there is no room for the construction that actions under Section 2410 can only be brought by third parties. The Ninth Circuit has indicated its disapproval of this restriction on such actions in *U. S. v. Coson,* 286 F. 2d 453 (9th Cir. 1961). Until there is a final determination by this Court, the taxpaying public will not have a definitive answer to this issue.

4. The Court of Appeals, in affirming the district court, erred in that they have in effect read into the requirements of 28 U. S. Code, Sec.2410 the requirement that the United States can only be sued, without its consent, under this provision when such action is brought by a third party. A taxpayer against whom the United States has asserted a lien against his property cannot, under this decision, bring an action under that section against the United States. Upon a reading of Sec. 2410, however, there appears no requirement that the action contemplated therein be limited to those brought by a third party rather than the taxpayer whose property is subject to a federal tax lien.

The Court of Appeals also erred in basing its decision on the erroneous premise that a tax assessment has the effect of a judgment. The reliance of the court on *Pipola v. Chicco,* 274 F. 2d 909 (2d Cir. 1960) and *Quinn et al. v. Hook,* 231 F. Supp. 718 (E. D. Pa. 1964), aff'd. 341 F. 2d 920 (3d Cir. 1965) is misplaced since they are based on reasoning contrary to the decisions of this court in *Clinkenbeard, supra,* and *Rindskopf, supra.*

CONCLUSION

For the reasons stated above, the decision of the Court of Appeals for the Fourth Circuit in the instant case raises a question of general importance in the administration of the tax laws which should be reviewed by this Court, especially since there is a conflict of decisions as to the interpretation of the statute involved and as to the effect of a tax assessment.

The decision below is palpably erroneous since it reads into 28 U. S. Code, Sec.2410 a restriction that the statute does not encompass.

For these reasons, the petition for certiorari should be granted.

Respectfully submitted,

DON T. EVANS
120 Howard Street
Rocky Mount, N. C. 27802

FRANK P. MEADOWS, JR.
P. O. Box 1413
Rocky Mount, N. C. 27802

Attorneys for Petitioners

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v.

UNITED STATES OF AMERICA,

Respondent.

Appendix for Petitioners

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES
COURT OF APPEALS FOR THE FOURTH CIRCUIT

APPENDIX A
OPINION BELOW

OPINION OF THE UNITED STATES
COURT OF APPEALS FOR
THE FOURTH DISTRICT

Waverly C. Broadwell and Nancy Broadwell, his wife, Appellants, v. United States of America, Appellee, No. 9751. Dohn Broadwell, Appellant, v. United States of America, Appellee, No. 9752.

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NORTH CAROLINA, AT FAYETTEVILLE. J. BRAXTON CRAVEN, JR., DISTRICT JUDGE.

(Argued March 3, 1965. Decided March 8, 1965.)

Before HAYNSWORTH, Chief Judge, BRYAN, Circuit Judge, and BUTZNER, District Judge.

Frank P. Meadows, Jr., (Meadows & Batts on brief) for Appellants, and George F. Lynch, Attorney, Department of Justice, (Louis F. Oberdorfer, Assistant Attorney General, Lee A. Jackson and Joseph Kovner, Attorneys, Department of Justice, and Robert H. Cowen, United States Attorney, and Gerald L. Bass, Assistant United States Attorney, on brief) for Appellee.

PER CURIAM:

By quia timet suits against the United States under 28 USC 2410, Waverly C. Broadwell, Nancy, his wife, and Dohn Broadwell, appellants, endeavored to remove the lien on their properties of income taxes assessed upon them for the year 1959. The object of the complaints, the appellants candidly concede, was to dispute the validity of the assessments. With the District Judge, and for the reasons he gives in his memorandum on dismissing the actions, 234 F.Supp. 17, we think: (1) that 28 USC 2410 is not available for the purpose for which it is now invoked, and (2) that appellants have not shown "the existence of special and extraordinary circumstances" warranting resort to a court of equity to contest the taxes, in the face of the prohibitions of 26 USC 7421(a), 7422.

Affirmed.

APPENDIX B

STATUTES INVOLVED

26 U. S. CODE, SEC. 6321. LIEN FOR TAXES.

If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount (including any interest, additional amount, addition to tax, or assessable penalty, together with any costs that may accrue in addition thereto) shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person.

26 U. S. CODE, SEC. 6322. PERIOD OF LIEN.

Unless another date is specifically fixed by law, the lien imposed by Sec. 6321 shall arise at the time the assessment is made and shall continue until the liability for the amount so assessed is satisfied or becomes unenforceable by reason of lapse of time.

26 U. S. CODE, SEC. 7421. PROHIBITION OF SUITS TO RESTRAIN ASSESSMENT OR COLLECTION.

(a) Tax. Except as provided in Sec.6212 (a) and (c), and 6213 (a), no suits for the purposes of restraining the assessment or collection of any tax shall be maintained in any court.

(b) Liability of transferee or fiduciary. — No suit shall be maintained in any court for the purposes of restraining the assessment or collection (pursuant to the provision of Chapter 71) of—(1) the amount of the liability, at law or in equity, of a transferee of property of the taxpayer in respect of any internal revenue tax, or (2) the amount of the liability of the fiduciary under Sec. 3467 of the revised statutes (32 USC 192) in respect of any such tax.

26 U. S. CODE, SEC. 7424.
CIVIL ACTION TO CLEAR TITLE TO PROPERTY.

(a) Obtaining Leave to File.—

(1) REQUEST FOR INSTITUTION OF PROCEEDINGS BY UNITED STATES.—Any person having a lien upon or any interest in the property referred to in section 7403, notice of which has been duly filed of record in the jurisdiction in which the property is located, prior to the filing of notice of the lien of the United States as provided in section 6323, or any person purchasing the property at a sale to satisfy such prior lien or interest, may make written request to the Secretary or his delegate to authorize the filing of a civil action as provided in section 7403.

(2) PETITION TO COURT.—If the Secretary or his delegate fails to authorize the filing of such civil action within 6 months after receipt of such written request, such person or purchaser may, after giving notice to the Secretary or his delegate, file a petition in the district court of the United States for the district in which the property is located, praying leave to file a civil action for a final determination of all claims to or liens upon the property in question.

(3) COURT ORDER.—After a full hearing in open court, the district court may in its discretion enter an order granting leave to file such civil action, in which the United States and all persons having liens upon or claiming any interest in the property shall be made parties.

(b) Adjudication.—Upon the filing of such civil action, the district court shall proceed to adjudicate the matters involved therein, in the same manner as in the case of civil actions filed under section 7403. For the purpose of such adjudication, the assessment of the tax upon which the lien of the United States is based shall be conclusively presumed to be valid.

(c) Costs.—All costs of the proceedings on the petition and the civil action shall be borne by the person filing the civil action.

28 U. S. CODE, SEC. 1340. INTERNAL REVENUE; CUSTOM DUTIES.

The District Court shall have original jurisdiction of any civil action arising under any act of Congress providing for internal revenue, or revenue from imports or tonnage except matters within the jurisdiction of the Customs Court.

28 U. S. CODE, SEC. 1964. CONSTRUCTIVE NOTICE OF PENDING ACTIONS.

Where the law of a State requires that a notice of an action concerning real property pending in a court of the State to be registered, recorded, docketed, or indexed in a particular manner, or in a certain office or county or parrish in order to give constructive notice of the action as it relates to the real property, and such law authorizes a notice of an action concerning real property pending in a United States district court to be registered, recorded, docketed, or indexed in the same manner or in the same place, those requirements of the State law must be complied with in order to give constructive notice of such an action pending in the United States district court as it relates to real property in such State.

28 U. S. CODE, SEC. 2201. CREATION OF REMEDY.

In case of an actual controversy within its jurisdiction, except with respect to the Federal taxes, any court of the United States upon the filing of appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

28 U. S. CODE, SEC. 2410. ACTIONS AFFECTING PROPERTY ON WHICH UNITED STATES HAS LIEN.

(a) Under the conditions prescribed in this section

and section 1444 of this title for the protection of the United States, the United States may be named a party in any civil action or suit in any district court, or in any State court having jurisdiction of the subject matter, to quiet title to or for the foreclosure of a mortgage or other lien upon real or personal property on which the United States has or claims a mortgage or other lien.

(b) The complaint shall set forth with particularity the nature of the interest or lien of the United States. In actions in the State courts service upon the United States shall be made by serving the process of the court with a copy of the complaint upon the United States attorney for the district in which the action is brought or upon an assistant United States attorney or clerical employee designated by the United States attorney in writing filed with the clerk of the court in which the action is brought and by sending copies of the process and complaint, by registered mail, or by certified mail, to the Attorney General of the United States at Washington, District of Columbia. In such actions the United States may appear and answer, plead or demur within sixty days after such service or such further time as the court may allow.

(c) A judicial sale in such action or suit shall have the same effect respecting the discharge of the property from liens and encumbrances held by the United States as may be provided with respect to such matters by the local law of the place where the property is situated. A sale to satisfy a lien inferior to one of the United States, shall be made subject to and without disturbing the lien of the United States, unless the United States consents that the property may be sold free of its lien and the proceeds divided as the parties may be entitled. Where a sale of real estate is made to satisfy a lien prior to that of the United States, the United States shall have one year from the date of sale within which to redeem. In any case where the debt owing the United States is due, the United States may ask, by way of affirmative relief, for the

foreclosure of its own lien and where property is sold to satisfy a first lien held by the United States, the United States may bid at the sale such sum not exceeding the amount of its claim with expenses of sale, as may be directed by the head of the department or agency of the United States which has charge of the administration of the laws in respect of which the claim of the United States arises.

(d) Whenever any person has a lien upon any real or personal property, duly recorded in the jurisdiction in which the property is located, and a junior lien, other than a tax lien, in favor of the United States attaches to such property, such person may make a written request to the officer charged with the administration of the laws in respect of which the lien of the United States arises, to have the same extinguished. If after appropriate investigation, it appears to such officer that the proceeds from the sale of the property would be insufficient to wholly or partly satisfy the lien of the United States, or that the claim of the United States has been satisfied or by lapse of time or otherwise has become unenforceable, such officer shall so report to the Comptroller General who may issue a certificate releasing the property from such lien.

N. C. GENERAL STATUTES, SEC. 1-116. (1963 Supp.) FILING NOTICE OF SUIT.

(a) Any person desiring the benefit of constructive notice of pending litigation must file a separate, independent notice thereof, which notice shall be cross-indexed in accordance with G. S. 1-117, in the following cases:

(1) Actions affecting title to real property;

(2) Actions to foreclose any mortgage or deed of trust or to enforce any lien on real property; and

(3) Actions in which any order of attachment is issued and real property is attached.

In the Supreme Court of the United States

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v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

In their 1959 income tax returns petitioners[1] reported the sale of certain parcels of property owned by them as tenants in common for a gross sales price of $83,200. They claimed certain deductions from the gross sales price and purported to elect the installment method of reporting the resulting gain (R. 9–10, 21–22).[2] After audit the Internal Revenue Service advised the taxpayers by notice of deficiency that their returns did not substantiate either the

[1] Petitioners are two brothers. The wife of one of the brothers was joined solely because she is a party to her husband's joint income tax return.

[2] "R" references are to the printed appendix filed by the petitioners in the court of appeals.

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claimed cost basis, the claimed expenses of sale or the petitioners' qualification to use the installment method of reporting. The Service thus increased each brother's 1959 taxable income by one-half of the gross sales price, with resulting proposed deficiencies of $16,921.87 and $24,466.19, respectively (R. 7–8, 19–20). The taxpayers did not petition the Tax Court for a redetermination of the proposed 1959 deficiencies.[3] Therefore the deficiencies were assessed against them and, after demand, automatically became liens on all of their property (Sections 6213, 6303, 6321, Internal Revenue Code of 1954).

Petitioners then filed consolidated actions in the district court asserting that the tax liens constituted a cloud upon the title to their property, relying on 28 U.S.C. 2410 (reproduced on pages B3–5 of the petition) as a basis for jurisdiction and as a waiver of sovereign immunity. Petitioners asked the district court to temporarily enjoin the government from attempting to collect the assessments, to review the merits of the deficiency on which the assessments were based and to permanently enjoin the government from collecting the taxes. On the government's motion the district court dismissed the complaints on the ground that:

> In light of the legislative history of Section 2410(a) it is apparent that the consent of the government, given under that section, does not extend to a taxpayer's attack on the merits of

[3] The same notices of deficiency also covered the year 1960 showing deficiencies for that year as well. The taxpayers filed petitions in the Tax Court with respect to 1960 only. See Tax Court Docket Nos. 408–64 and 400–64.

> a tax assessment through the vehicle of a suit to quiet title. [R. 28.]

The court of appeals affirmed, stating "that 28 USC 2410 is not available for the purpose for which it is now invoked" (Pet. A2).

This Court has recently given exhaustive consideration to the various remedies available to an aggrieved taxpayer. In *Flora* v. *United States,* 362 U.S. 145, the Court held that a taxpayer can initiate judicial review on the merits of his tax controversy in either of two ways: He can petition the Tax Court within 90 days after receiving a notice of deficiency, in which event the government is precluded from assessing or attempting to collect the tax during the pendency of the litigation (Section 6213, Internal Revenue Code of 1954). Or the taxpayer can forego this prepayment remedy, pay the entire amount of the tax deficiency and sue for a refund in either the district court or the Court of Claims (28 U.S.C. 1346(a)(1); Sections 7422, 6511, 6532, Internal Revenue Code of 1954.) What the taxpayer cannot do is to forego his prescribed prepayment remedy in the Tax Court and then obtain district court review without first paying the tax deficiency in full.[4]

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[4] See Section 7421, Internal Revenue Code of 1954 (prohibiting suits to restrain the assessment or collection of any tax), 28 U.S.C. 2201 (forbidding any declaratory judgment action with respect to federal taxes), and *Flora* v. *United States*, 362 U.S. 145, 163, stating that "there is one tribunal for prepayment litigation [the Tax Court] and another for post-payment litigation [the district courts and the Court of Claims], with no room contemplated for a hybrid of the type proposed by petitioner."

Petitioner claims that 28 U.S.C. 2410 provides an exception to this "carefully articulated and quite complicated structure of tax laws" (362 U.S. at 157), so that by labeling his suit an action to quiet title under 28 U.S.C. 2410 a taxpayer may obtain (1) a district court review on the merits of his tax controversy without first paying the deficiency and (2) an injunction against the collection of the tax. Such an exception would, of course, swallow the rule laid down in *Flora* v. *United States, supra,* and frustrate the express statutory prohibitions against suits to enjoin the collection of taxes and against declaratory judgments with regard to federal taxes.[5]

As this Court has recognized (*United States* v. *Brosnan,* 363 U.S. 237, 244–246), Section 2410 was designed to give third parties who either had a lien upon or had purchased the taxpayer's property certain rights to litigate the standing of the federal government's lien. The legislative history of Section 2410 clearly shows that it was intended to serve this lim-

[5] See *Dodge* v. *Osborn,* 240 U.S. 118, 121–122, where this Court said that the anti-injunction statute could not be circumvented by a claim that the lien arising from the tax assessment "would constitute a cloud on the plaintiffs' title"; and *Great Lakes Co.* v. *Huffman,* 319 U.S. 293, where in a suit involving the statute prohibiting federal courts from enjoining State tax collections except under prescribed circumstances this Court observed (*id.* at 300) that "a declaratory judgment * * * is analogous to equity jurisdiction in suits *quia timet* or for a decree quieting title."

In fact, in both the district court and court of appeals petitioners claimed that the instant action came within the carefully proscribed exception to the no-injunction statute. See *Enochs* v. *Williams Packing & Navigation Co.,* 370 U.S. 1. Both lower courts rejected the claim and petitioner has now dropped it.

ited purpose and was not meant to eviscerate all of the remedies so "carefully articulated" (362 U.S. at 157) in the Code. All of the courts of appeals which have considered the question have so held. In *Falik* v. *United States*, 343 F. 2d 38 (C.A. 2) and *Quinn* v. *Hook*, 341 F. 2d 920 (C.A. 3), affirming *per curiam* 231 F. Supp. 718, as well as in the instant case, the courts of appeals held that the taxpayer could not use a suit to quiet title under Section 2410 to litigate the merits of his underlying tax deficiency. Nor has any court of appeals permitted a third party lienor or purchaser (*i.e.*, a person other than the taxpayer) to litigate the merits of an underlying deficiency.[6]

[6] In *Pipola* v. *Chicco*, 274 F. 2d 909 (C.A. 2), the court expressly held that a third party could not raise the merits in a Section 2410 suit; one of the grounds for this conclusion was subsequently withdrawn in *United States* v. *O'Connor*, 291 F. 2d 520 (C.A. 2), but the holding itself was reaffirmed in *Falik* v. *United States*, 343 F. 2d 38 (C.A. 2) (dicta). In *United States* v. *Morrison*, 247 F. 2d 285 (C.A. 5), involving a challenge by a third party, the court merely reviewed the priority of the liens without discussing the merits of the underlying tax deficiency, but remarked that the questions open on a Section 2410 proceeding also included whether "the Government has no lien because the property did not belong to the taxpayer, *the tax was not properly assessed*, or the lien was time barred" (*id.* at 290; emphasis added). It is not clear whether the italicized dicta referred only to the procedural steps in making an assessment or to the merits of the underlying deficiency as well. Both *Wells* v. *Long*, 162 F. 2d 842 (C.A. 9) and *Remis* v. *United States*, 273 F. 293 (C.A. 1) were dismissed for lack of federal jurisdiction without any consideration of whether the third party could raise the merits of the deficiency on which the lien was based. See also *United States* v. *Coson*, 286 F. 2d 453 (C.A. 9).

This case does not raise the question whether the taxpayer himself could ever use Section 2410 to quiet title to his property for reasons not relating to the merits of the underlying tax deficiency, such as when the taxpayer claims that the assessment has been discharged by payment. Nor does this case involve the question whether a third party lienor or purchaser (as contrasted with the taxpayer himself) can raise the merits of the underlying deficiency in a Section 2410 proceeding. The only question raised by the instant case is whether a taxpayer himself, having foregone his available prepayment remedy in the Tax Court, can (contrary to the holding in *Flora*) initiate judicial review on the merits of the deficiency (as well as obtain an injunction against collection) without first paying the tax in full. On none of these three questions is there any conflict in the decisions of the courts of appeals.[7]

[7] The three cases cited by petitioner stand for the proposition that the taxpayer can *defend* on the merits when the government seeks to use the courts to enforce and collect its tax assessment, *Clinkenbeard* v. *United States*, 21 Wall. 65; *United States* v. *Rindskopf*, 105 U.S. 418; *United States* v. *O'Connor*, 291 F. 2d 520 (C.A. 2), and are thus not relevant to the question at hand: The ways in which the taxpayer can *initiate* judicial review on the merits of his tax deficiency.

For the foregoing reasons it is respectfully submitted that the petition for a writ of certiorari should be denied.

ARCHIBALD COX,
Solicitor General.
JOHN B. JONES, JR.,
Acting Assistant Attorney General.
JOSEPH KOVNER,
GEORGE F. LYNCH,
Attorneys.

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